No. 86-454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

BRIEF OF RESPONDENTS KELLERMAN/DAVIS/TUROVITZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether a wholly interlocutory order involving no conflict and impinging on no federal statute is reviewable by this Court.
2. Whether state law tort remedies for deceptive advertising are preempted by the Federal Communications Act.

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STATUTES INVOLVED

Ch. 121½, Sec. 262, Ill. Rev. Stat.

262. Unlawful practices—Construction with Federal Trade Commission Act

Sec. 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense,

false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment or any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. * * * *

Ch. 121½, Sec. 270a, Ill. Rev. Stat.

270a. Action for damages

Sec. 10a. (a) Any person who suffers damage as a result of a violation of Sections 2 through 20 of this Act[1] committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper.

* * * *

[1] Paragraphs 262 to 262-o of this chapter.

Ch. 121½, Sec. 312, Ill. Rev. Stat.

312. Acts constituting deceptive trade practice

Sec. 2. A person engages in a deceptive trade practice when in the course of his business, vocation or occupation, he:

* * * *

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

* * * *

(7) represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services or business of another by false or misleading representation or act;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

STATEMENT OF FACTS

This action was commenced by the filing of a class action complaint by Isidore Kellerman in the Circuit Court of Cook County, Illinois, in December, 1982. That complaint alleged that MCI published advertising in which it made comparisons between its long-distance rates and those of Bell/AT&T and represented savings on its services. In making such comparisons MCI did not make any disclosure that there is an additional cost attendant upon the use of MCI services because a user pays a local access charge to reach MCI relay equipment. That additional expense dramatically effects the cost comparisons on many

calls. Count I alleged that this omission violated the Illinios consumer fraud statute and sought damages for an Illinois class. Count II alleged that the omission constituted common law fraud or misrepresentation and sought damages on behalf of a national class. MCI removed the case to the United States District Court. The District Court remanded the case to the state court.

In November 1983, Louis T. Davis & Associates, Inc.* filed an intervenor class action complaint. That complaint made the same allegations concerning advertising and comparisons as the original Kellerman complaint. In addition, that complaint alleged that MCI made favorable cost comparisons in its advertising without disclosing another additional expense, that in certain situations an MCI customer pays for uncompleted calls. This omission was alleged to also violate statutory provisions and common law and damages were sought on behalf of an Illinois class and a national class.

In November, 1983, a class action suit was filed on behalf of Bernard Turovitz. The Turovitz complaint mirrored the Davis intervenor complaint seeking damages for Illinois and national classes.

None of the above three complaints alleged any violation of federal law. None of them in any way alleged that MCI's rates or charges were unreasonable. None of the three complaints alleged that MCI failed to provide nondiscriminatory service.

An order was entered consolidating Turovitz with Kellerman/Davis. In July, 1984, the Plaintiffs in the consoli-

* This is an Illinois corporation with no parent corporation, no subsidiary corporations and no affiliates.

dated Kellerman/Davis/Turovitz case filed an Amended Class Action Complaint.

MCI filed a motion to stay or to dismiss the amended complaint. That motion asserted preemption as a basis of dismissal. The motion asserted primary jurisdiction of the F.C.C. as a basis for a stay and asserted that the pendency of certain federal law suits alleging violations of federal law constituted a basis for a stay. The trial court entered its memorandum opinion denying the motion to dismiss and the motion to stay. MCI filed a Notice of Interlocutory Appeal only from the denial of the motion for a stay.

REASONS FOR DENYING WRIT

I.

THE COURT'S JURISDICTION IS NOT PROPERLY INVOKED UNDER 28 U.S.C. SEC. 1257(3) BECAUSE THERE IS NO FINAL JUDGMENT OR DECREE.

The Illinois Supreme Court order is wholly interlocutory in nature. The trial court denied a motion to stay proceedings. That order gave rise to an appeal as a matter of right to the Appellate Court of Illinois. The Appellate Court affirmed. MCI filed a petition for leave to appeal to the Illinois Supreme Court, and that court affirmed. The case is still pending in the Circuit Court of Cook County, Illinois, and pretrial discovery procedures and other pretrial matters continue on. Classes have been certified. The trial court has set a discovery cutoff and a trial and final judgment can be expected in mid-1987. The decision of the Illinois Supreme Court is not a final judgment or decree within the meaning of 28 U.S.C. Sec. 1257. *Flynt v. Ohio,* 451 U.S. 619, 68 L. Ed. 2d 489, 101 S.

Ct. 1958 (1981); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972 (1947).

II.

THESE ACTIONS ARISE EXCLUSIVELY UNDER STATE LAW.

The deceptive content of media advertising is a proper subject of a cause of action under the Illinois consumer fraud statute and the Illinois deceptive trade practices statute. *People ex rel. Hartigan v. Hunter Publishing Corp.*, 119 Ill. App. 3d 1049 (1st Dist. 1983). The gist of the Kellerman/Davis/Turovitz Class Action Complaint is a prayer for damages for statutory and common law torts for failing to disclose in public advertising that there were costs which made rate comparisons unfavorable and inaccurate. This lawsuit would not have come about if MCI had included in its advertisements of cost comparisons the following disclosure:

> in some situations an MCI customer incurs charges from its local telephone company for access to MCI lines or charges for some attempted calls which are not completed. These potential charges are not included in the comparisons of MCI rates and Bell rates shown in this table.

Petitioner incorrectly portrays this as a case which involves the "charges and practices" of a specialized common carrier subject to regulation under the Federal Communications Act. Plaintiffs have never questioned the propriety of or commercial reasonableness of MCI's rates.[1]

[1] AT&T provides that *chargeable time* shall commence when connection is established. We do not suggest that MCI cannot use a different criterion or compute its charge any way it wants, but

(Footnote continued on following page)

Petitioner refers to the claims herein as claims for "refunds". The local access charges are neither imposed by nor collected by MCI. The damages sought by Plaintiffs are not "refunds".

III.

THE ILLINOIS SUPREME COURT'S DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court considered the relationship between state regulation of advertising and federal regulation of broadcast facilities under the Communications Act in *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963), and held that F.C.C. jurisdiction over radio broadcasting did not preempt a state statute regulating the content of advertising for eyeglasses. Examining the standard applied there, a similar result is required here. There are no F.C.C. regulations even remotely touching on the subject matter of deceptive advertising. The F.C.C. itself has indicated that it sees no objection to state claims for deceptive advertising.[2]

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[1] *continued*
when it makes comparisons in advertising showing cheaper rates it has a duty to disclose that it uses a different method which sometimes results in a charge even when no one answers, as has now been admitted by MCI in pleadings filed below.

[2] In response to an informal inquiry by your responding counsel the Chief of the Common Carrier Bureau, F.C.C., Albert Halprin stated in a letter dated January 17, 1986, that the *Bill Correctors, Ltd. v. MCI Communications Corp.* case did not preempt state regulation of advertising. In response to a request for retraction by MCI dated February 12, 1986, Mr. Halprin reiterated in a letter dated February 19, 1986, that the *Bill Correctors* case did not preclude a challenge under state law such as the claims asserted herein. These documents were a part of the record before the Illinois Supreme Court.

Nader v. Allegheny Airlines, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976) set the parameters for actions such as this by finding that "the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts . . ." 48 L. Ed. 2d at 656.

IV.

THE ILLINOIS SUPREME COURT'S DECISION BELOW DOES NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

There is no conflict between the Illinois Supreme Court's opinion and any federal court decisions. The opinion in *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2nd Cir. Aug. 25, 1986) is unique in that it directly challenged the manner in which a carrier charged for international calls. The Court affirmed summary judgment for the company on the ground that international calls had been billed in accordance with the "Interconnection and Service Agreement Between the American Telephone & Telegraph Company and the Trans-Canada Telephone System" and tariffs on file with the F.C.C., and affirmed dismissal because of the failure of the plaintiff to present evidence that prices were quoted for intra-Canadian calls in Canadian Dollars. The claims were for improper and fraudulent billing practices, not for deceptive advertising.

The *Nordlicht* court specifically rejected the Communications Act as a basis of federal jurisdiction, as the same court did in *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F. 2d 486, 489 (2nd Cir. 1968), stating:

> clearly the remedy which plaintiff seeks is not one granted by an act of Congress . . . Nor do we think that such a remedy should be "inferred" from the Act; there is no reason to believe that Congress, in

the Communications Act, intended to declare the existence of the fundamental right to recover for tort or breach of contract.

Petitioner cites several federal district court cases as being in "conflict" with the Illinois Supreme Court. Most, if not all, of those cases were consolidated as multi-district litigation in the Eastern District of Michigan. The consolidated complaint pending there affirmatively alleges federal jurisdiction under and asserts claims arising under the Federal Communications Act and the Racketeer Influenced and Corrupt Organizations Act. This case presents absolutely no such claims under federal law.

The claims in the Kellerman/Davis/Turovitz complaint here for failure to disclose in advertising that local access charges distort rate comparisons are *absolutely unique*. There is not another case anywhere which involves a claim under state law for deceptive advertising based upon those facts, and no relief can be granted anywhere else based upon those issues.

V.

THE F.C.C. DOES NOT REGULATE ADVERTISING BY SPECIALIZED COMMON CARRIERS.

The essential elements of regulation under Title II of the Communications Act entail control of price, establishment through tariffs of terms and conditions of service, prohibitions on discrimination, control of investments and an obligation to serve all. It can be viewed as a regulatory scheme directed at problems associated with monopoly control or market power. No provision of the Act directly or indirectly deals with deceptive advertising. The regulations of the Federal Communications Commission, 47 C.F.R. Parts 20 to 69, simply do not contemplate that the

F.C.C. shall supervise the content of common carrier advertising to determine whether or not it is deceptive.[3]

The *Second Computer Inquiry* was the first major step taken by the Commission to narrow the scope of activities subject to regulation.[4] In *Second Computer Inquiry* the Commission prohibited regulated carriers from engaging in the sale or promotion of enhanced services or customer premises equipment on behalf of their unregulated separate subsidiaries. Thus, the Commission dealt only with "advertising" as it was necessary to protect the integrity of structural separation. The Commission did not address deceptive advertising. A similar result prohibiting merged companies from manipulating shared advertising expenses was reached in *GTE and Telenet Merger*, 84 F.C.C. 2d 18 (1979). That case also had to do with monopoly power and structural separation. This case does not involve those issues.

The consistent policy in recent years has been to deregulate specialized common carriers.[5] In its *Fourth Report*

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[3] There is mention of "promotion" or "disclosure" in a recent amendment, Section 64.702. That provision deals solely with the implementation of a policy to require and to secure the integrity of structural separation between related corporations providing both regulated and unregulated telecommunications services. It does not deal with deceptive advertising.

[4] *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1979), *aff'd on recon.*, 84 F.C.C. 2d 50 (1980), 88 F.C.C. 2d 512 (1981), *aff'd sub nom. CCIA v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983).

[5] *See, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C. 2d 308 (1979), *First Report and Order*, 85 F.C.C. 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445 (1981); *Second Report and Order*, 91 F.C.C. 2d 59 (1982), *recon. denied*, 93 F.C.C. 2d 54 (1983); *Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982); *Third Further Notice of Proposed Rule-*

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the Commission articulated the guiding principle that "the Commission has the duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and *to refrain from imposing and to remove unnecessary regulatory burdens on carriers.*" 95 F.C.C. 2d at 580. (emphasis added) MCI is asking this Court to increase the regulatory burden on carriers and to expand the regulatory responsibilities of the F.C.C. into new areas. That request is not appropriate.

CONCLUSION

The wholly interlocutory order of the Illinois Supreme Court is not subject to review under 28 U.S.C. Sec. 1257(3). The Communications Act does not preempt the purely state-law causes of action asserted herein. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] *continued*
making, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11,856 (1984); *Fifth Report and Order*, 98 F.C.C. 2d 1191 (1984); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities, Authorization Therefore: Sixth Report and Order*, 57 Rad. Rep. 2d (P&F) 1391 (1985).